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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1958

No. 76

KLOR'S, INC., *Petitioner,*

vs.

BROADWAY-HALE STORES, INC., ADMIRAL CORPORATION, ADMIRAL DISTRIBUTORS, INC., ZENITH RADIO CORPORATION, WHIRLPOOL SEEGER CORPORATION, H. R. BEDFORD COMPANY, RADIO CORPORATION OF AMERICA, LEO J. MEYBERG COMPANY, EMERSON RADIO AND PHONOGRAPH CORPORATION, JEFFERSON-TRAVIS, INC., PHILCO CORPORATION, PHILCO DISTRIBUTORS, INC., DALLMAN SUPPLY COMPANY, RHEEM MANUFACTURING COMPANY, GENERAL ELECTRIC COMPANY, GENERAL ELECTRIC DISTRIBUTING CORPORATION, OLYMPIC RADIO AND TELEVISION, INC., OLYMPIC TELEVISION OF NORTHERN CALIFORNIA, TAPPAN STOVE COMPANY, O'KEEFE & MERRITT COMPANY,

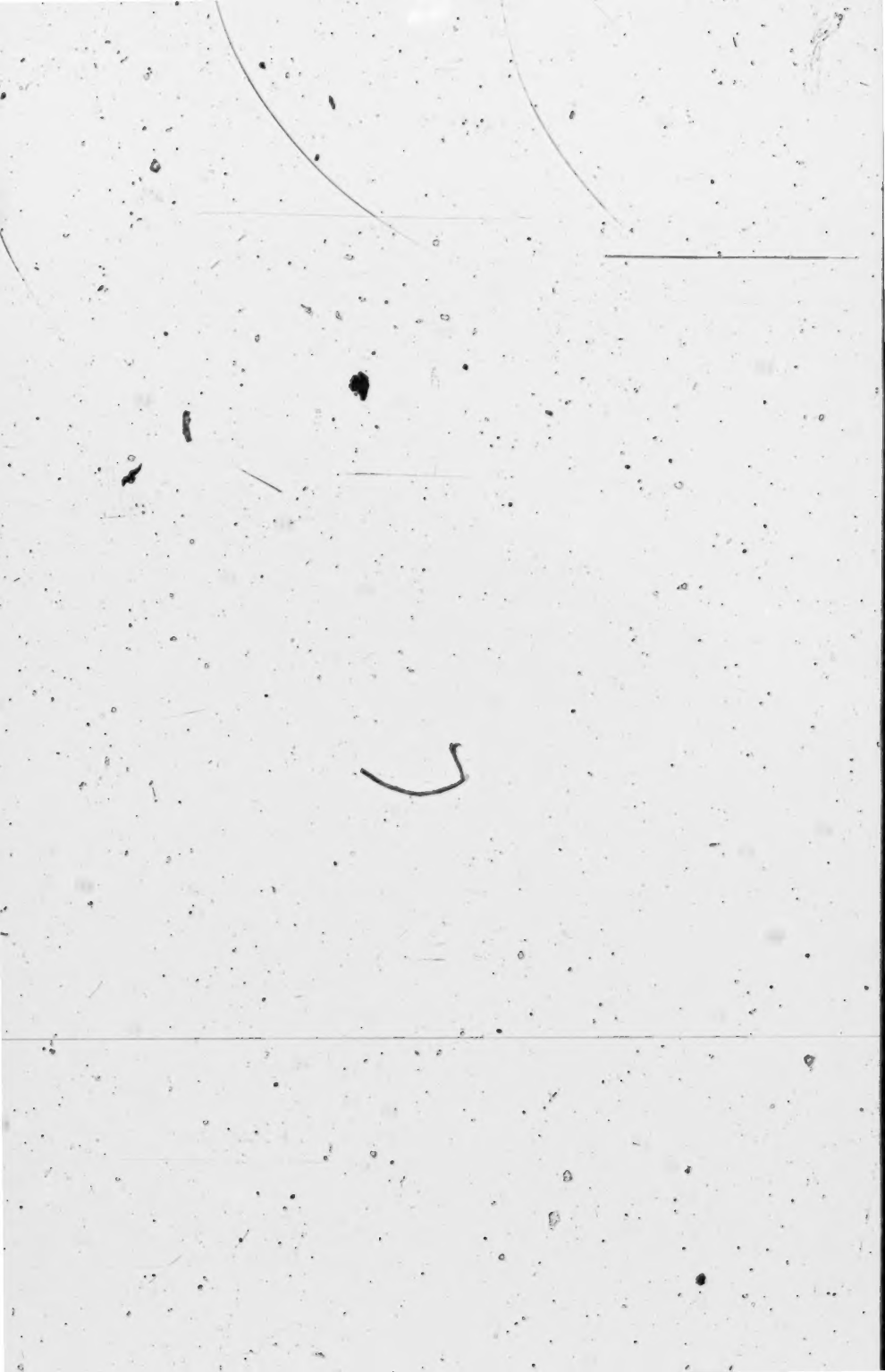
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONER'S OPENING BRIEF.

IRVIN GOLDSTEIN,
MAXWELL KEITH,
111 Sutter Street,
San Francisco 4, California,
Attorneys for Petitioner.

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Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONER'S OPENING BRIEF.

I.

OPINIONS AND JUDGMENTS IN THE COURTS BELOW.

The order of the District Court was filed on September 13, 1956 (R. 133-134) and the judgment of the District Court was filed September 18, 1956 (R. 135-136). Neither has been reported.

The judgment of the Court of Appeals was entered on March 28, 1958. (R. 181.) The opinion of the United States Circuit Court of Appeals for the Ninth Circuit was filed March 28, 1958. (R. 148.) 255 F. 2d 214.

This Court granted petition for certiorari October 13, 1958.

II.

JURISDICTIONAL STATEMENT.

Petitioner asserts that the respondents are in violation of the federal antitrust laws.

Sherman Act, Sections 1 and 2, July 2, 1890, Chap. 647, Sec. 1, 26 Stat. 209, as amended July 7, 1955, c. 281, 69 Stat. 282, 15 U.S. Code, Sec. 1, Sec. 2:

Sec. 1:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: . . ."

Sec. 2:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any

other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments in the discretion of the court."

Petitioner brings his action under Section 4 of the Clayton Act, October 15, 1914, Chap. 323, Sec. 4, 38 Stat. 731, 15 U.S. Code, Sec. 15:

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

The judgment of the United States Court of Appeals for the Ninth Circuit affirming the dismissal of petitioner's complaint and for summary judgment under said laws by the District Court was entered on March 28, 1958. The jurisdiction of this Court is invoked under 28 U.S.C.A. 1254(1).

III.

STATUTES INVOLVED.

The statutes involved are set forth above. In addition, F.R.C.P., Rule 56, Summary Judgment, is printed and attached hereto in Appendix A.

IV.

QUESTION PRESENTED.

1. Whether Section 4 of the Clayton Act affords the federal courts jurisdiction to protect single traders from forbidden conduct of the type condemned in the Sherman Act which is in or affects the free flow of commodities in interstate trade and commerce; or, whether the federal courts are allowed to dismiss bona fide complaints under summary judgment procedure on the ground that the antitrust laws afford protection to the public at large and do not afford federal jurisdiction to the protection of a single trader.

V.

STATEMENT OF THE CASE.

The petitioner-plaintiff was the owner of a large appliance store located on Mission Street, San Francisco. It was next door to one of respondent's Broadway-Hale's department stores. The complaint was filed on February 23, 1956 against Broadway-Hale and ten leading manufacturers and eight distributors of radio and television sets and household appliances. The complaint as originally filed contained charges of violations of the Robinson-Patman Act, Act of June

19, 1936, Chap. 592, 49 Stat. 1526, 15 U.S.C. 13. By pre-trial order (R. 19, 20) the complaint as to violations of the Sherman Act were separated from charges of violations of the Robinson-Patman Act. Thereafter below and on appeal the proceedings were concerned only with Count One of petitioner's complaint, as printed in the record. (R. 3-15.)

Petitioner's complaint asserted the jurisdiction of the federal Court under the antitrust laws, and alleged that the business of manufacturing, distributing and selling radios, television sets, and other household appliances are within or directly affect trade and commerce among the several states. The complaint alleged a continuous stream of trade and commerce between the states in the manufacture and distribution and sale of these goods throughout the United States. (R. 4.) It alleged that these products are manufactured in one place and transported to factory branches, distributors and other selling organizations; then transported from said branches or distributors to retailers. (Id.)

The complaint then described the parties. It set forth the states of incorporation of the defendant manufacturers and distributors. It specified which products are manufactured by the respondents and the affiliation if any between the respondents. (R. 5-8.)

The complaint alleged that the respondent, Broadway-Hale Stores, Inc. "is a Delaware Corporation, operating among other things, a chain of stores in the western area of the United States selling at retail radios, television sets, clothes washers and dryers, re-

frigerators, electric and gas ranges, phonographs and electrical appliances." (R. 5.)

The respondent manufacturers and their distributors were shown to be competitive in the manufacture or distribution of radio and television sets, ranges, refrigerators and washers and dryers, as follows (R. 6-8, 127, 211):

Radio and television:

Admiral Corporation and Admiral Distributors, Inc.

Zenith Radio Corporation, H. R. Basford Company.

Radio Corporation of America, Leo J. Meyberg.

Emerson Radio and Phonograph Corp., Jefferson-Travis.

Philco Corporation, Philco Distributors, Inc., Dallman Supply Company.

General Electric Company, General Electric Distributing Corporation.

Olympic Radio and Television, Inc., Olympic Television of Northern California.

Ranges:

Admiral, supra; General Electric, supra; Tappan Stove Company; O'Keefe and Merritt Company; Rheem Manufacturing Company (Wedgewood).

Refrigerators:

Philco, supra; General Electric, supra; Admiral, supra.

Washers and dryers:

Whirlpool-Seeger Corporation (p. 21); H. R. Basford Corp.; General Electric, supra.

The complaint then alleged that the interstate trade and commerce in the manufacture, distribution and sale of radios, television sets, clothes washers and dryers, refrigerators, electric and gas ranges, phonographs and electric appliances was restrained in the San Francisco Bay Area by the respondents in violation of Sections 1 and 2 of the Sherman Act. (R. 8-10.) The restraint occurred by the "contracting, combining, conspiring together, and each with the other". (Id.) Competition in the interstate distribution and sale of these appliances, it was alleged, was "substantially lessened, limited and restrained". The refusal of the respondents to sell to the petitioner, and the discrimination against him in the favor of Br dway-Hale restrained, lessened and limited interstate trade. (Id.) The complaint alleged that the conspiracy and combination "tend to and do actually restrain and monopolize interstate commerce in the distribution and sale of radios, television sets, clothes washers and dryers, refrigerators, electric and gas ranges, phonographs and electric appliances in favor of Hale." (R. 10.)

Next the complaint specified the discriminatory conduct of the respondents (R. 10-11) and the group refusal to deal with petitioner. (Id.)

Paragraph 8 of the complaint directly raised the "monopolistic buying power" of the defendant Broadway-Hale. It alleged that said respondent used its monopolistic buying power to negotiate terms and conditions of acquisition and purchase of the products manufactured, distributed and sold by the defendants.

(R. 11.) It alleged that Broadway-Hale "had used its monopolistic buying power" in dealing with the manufacturer-distributor respondents, and that it "has purchased and continued to purchase the products of the manufacturer-distributor defendants upon the condition that the manufacturer-distributor defendants do not sell their products to the plaintiff." (R. 12.) It alleged that the manufacturer-distributor respondents did business with Broadway-Hale on a chain basis. (Id.)

The complaint then specified injury and damages by reason of the monopoly buying power of defendant Hale and the illegal discriminatory tactics, and conspiracies involved. (R. 12, 15.)

The complaint, then, may be summarized as involving the following:

(1) A conspiracy composed of ten interstate distributors, their manufacturers and an interstate retailer, Broadway-Hale, to discriminate against the petitioner as to those products sold it in prices, advertising allowances, demonstration techniques, and other terms and conditions connected with the sale and distribution of the products manufactured and sold by respondents. (Complaint, pr. 6, R. 9-11.)

(2) A conspiracy composed of the same parties to refuse to sell their products to petitioner, a group refusal to deal.

(3) A plan by these parties to allow Broadway-Hale a monopolistic position in the sale of their products.

(4) An attempt by Broadway-Hale to use its chain buying power to monopolize the sale of these parties' products and to eliminate competition from petitioners.

(5) A specific intent by Broadway-Hale to monopolize the retailing of household appliances.

After the complaint was filed, the respondent Broadway-Hale immediately moved to dismiss Count One of the complaint for failure to state a claim for relief. (R. 16.) In its dismissal papers it urged that (R. 16-17):

> "The cases are legion that no cause of action under the Sherman Act exists unless there is an *injury to the public interest,* and that the Act does not care whether the plaintiff or someone else does the business so long as interstate commerce continues. That is to say, there must not only be injury to the plaintiff, but to the *public also.*"

Thereafter the order separating the counts in the complaint was made (R. 20), and the respondents, still without asserting an answer, moved to dismiss Count One of the complaint on two grounds. These grounds were failure to state a claim upon which relief can be granted and for summary judgment on the ground that there is no genuine issue as to any material fact. (R. 22-23, 128, 130, 132.)

The basic foundation of the respondents' motions was the failure on the part of the petitioner to have shown an injury to the public interest.

As against the positive averments of petitioner's complaint alleging conspiracies to discriminate and boycott, the use of monopolistic chain buying power and the oppression of the competition of a trader, the respondents in support of their motion for summary judgment filed affidavits which showed the lists of accounts to which the merchandise was sold and the availability of other products on the market.

The affidavit of Broadway-Hale did not inform the Court of relevant facts or figures to show its lack of chain buying power. It did not inform the Court of its volume of purchases, how it transacted business, its relative growth or decline in volume of purchases or sales. It did not deny the allegations of the petitioner's complaint. The allegations of the monopolistic plan to injure the petitioner stood virtually uncontested. Instead the affidavit showed only that there were other brands of merchandise available to petitioner than those involved in the complaint, and that there were numerous retail dealers in the San Francisco telephone book listings. (R. 25-43.)

The affidavit of Broadway-Hale failed to assert that it could have successfully operated with the products claimed denied to petitioner, or that it had not affirmatively sought to prevent its competitor from obtaining these products. The affidavit of Broadway-Hale further failed entirely to direct itself to the issues of interstate commerce. It did not indicate to the Court where it was operating or how it did business.

The affidavits of the respondent manufacturers and distributors were of a similar cast. These affidavits did not contain statements controverting the allegations of conspiracy and monopolization. Rather they showed that the respondents did not sell their merchandise to petitioner. (Admiral, R. 45-47; Zenith, R. 48-50; Whirlpool, R. 50-52; RCA, R. 52-54 (and see telephone book, R. 30); Emerson, R. 54-57; Philco, R. 58-62; Wedgewood Stoves, R. 62-66; General Electric, R. 66-116; Olympic, R. 116-117; O'Keefe & Merritt Company, R. 121-124.)

Although the affidavits affirmatively showed that the respondents had not supplied the petitioner, they offered no factual evidence of why such was the case. They failed to inform the Court of how they classified their accounts, their volume of business with their various accounts and the volume of their business in interstate trade and commerce.

The affidavits were directed at a legal proposition; that the antitrust laws do not afford a federal court jurisdiction to determine the merits of a complaint filed by a single competitor against his chain buying competitor and his potential suppliers if the public is otherwise able to buy products.

The Courts below were faced with hybrid affidavits in summary judgment which showed on their face the existence of a group refusal to sell without explanation or justification. Petitioner, although admittedly operating a large retail store, "at least comparable to the stores operated by Hale in plaintiff's com-

petitive area" (R. 11) was admittedly unable to obtain the following merchandise: Admiral radios, televisions, refrigerators and electric ranges, Zenith radio and television sets, Whirlpool clothes washers and dryers, RCA radio and television sets, Emerson radio and television sets, Philco radio and television sets and refrigerators, Wedgewood stoves, General Electric television sets and radios, electric ranges and clothes washers and dryers, Olympic radio and television sets, Tappan stoves, O'Keefe & Merritt products. (R. 45-125.)

A summary of what the affidavits disclosed is set forth in the opinion of the Court of Appeals below. (R. 158-160.)

The Courts below, however, did not demand that the respondents controvert the allegations of petitioner, and accepted these affidavits as sufficient to show that the federal courts did not have jurisdiction to allow the petitioner a trial on the merits. The decision and judgment of the District Court are based on lack of jurisdiction under the antitrust laws.

The District Court stated that Count One is not a cause of action under the antitrust laws. Count One, it said, "is not concerned with private damage caused by a public wrong proscribed by the Act." (R. 134.) The Court further stated that "there is not the slightest basis either in substantiality or law for the exercise of our jurisdiction." Thus the Court did not seemingly rely on F.R.C.P., Rule 56, in its opinion, by saying that there was a lack of disputed fact between the parties. Rather, the Court stated that peti-

tioner had not raised a claim for relief under the antitrust laws.

The concept of "public injury" was invoked.

The judgment of the District Court was a judgment of dismissal of the complaint and for summary judgment. (R. 135-136.) The judgment did state that there is no genuine issue of fact respecting Count One. (Id.)

The Ninth Circuit affirmed the judgment of the lower Court. (R. 181.) The Court held that petitioner's first claim for relief was fatally defective, and that the facts proved no conduct in violation of the antitrust laws because there had been no conduct by which the "public" could conceivably suffer injury. (R. 180.) Construing the complaint and the affidavits together, and considering the facts judicially known to the Court, the Court of Appeals below affirmed the motion for summary judgment. (Id.) Thus the Ninth Circuit affirmed the judgment of the lower Court that the proceedings below had demonstrated that the federal court had no jurisdiction under the antitrust laws to afford petitioner a trial by jury as demanded. (R. 15.)

The Court of Appeals concluded as follows: (1) the antitrust laws do not condemn the entry into conspiracies by otherwise competitive corporations affecting interstate trade and commerce to the injury of a single trader, and do not condemn the plans of a chain buying corporation to harm and injure its competitor; (2) the antitrust laws are designed to protect only the public at large, and the public is not

entitled to the competition of all traders in a market free of predatory conduct otherwise condemned by the antitrust laws if applicable to an entire class; (3) the existence of a conspiracy in *per se* restraint of trade, a conspiracy to boycott, may be controverted on summary judgment by showing that the conspirators did not ruin all or a substantial amount of competition; (4) the doctrine of *per se* violation of the antitrust laws permits or allows the Courts to consider the economic effect of the conduct *per se* forbidden on the public at large; (5) in a summary judgment setting, the Court may construe plaintiff's complaint against him and restrict inferences from the complaint. Thus the Court of Appeals failed to view petitioner's complaint as involving a conspiratorial refusal to deal or as involving predatory monopolistic conduct by the owner of a chain of retail stores doing business in interstate channels. (R. 171-172.)

The Court of Appeals did not base its decision on the interstate commerce jurisdictional test of the substantiality of the amount of interstate trade and commerce involved. The Court stated (R. 160):

> "We need not concern ourselves here with the substantiality of the amount of commerce involved. *Apex* tells us 'it is the nature of the restraint and its effect on interstate trade and commerce and not the amount of commerce which are the tests of violation.'"

VI.

SUMMARY OF THE ARGUMENT.

Petitioner is allowed by Section 4 of the Clayton Act to obtain damages against those conspiring or using monopolistic power to interfere with his "right of freedom to trade." *United States v. Colgate & Co.*, 1919, 250 U.S. 300, 307, 39 S.Ct. 465, 468; *Benderup v. Pathe Exchange*, 1923, 263 U.S. 291, 44 S.Ct. 96. The elimination or suppression of competition of a trader through conspiracy or through the use of monopoly power are public wrongs under the Sherman Act.

Petitioner's claim need only be "tested under the Sherman Act's general prohibitions on unreasonable restraints of trade" and meet the requirement that petitioner has thereby suffered injury. Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public, and has provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party. These laws protect the victims of forbidden practices as well as the public. *Radovich v. National Football League*, 1957, 352 U.S. 445, 453, 77 S.Ct. 390, 395.

The allegations of petitioner's complaint are directly within the general prohibitions of the antitrust laws. The complaint alleges a conspiratorial refusal to deal. It is the entry into this conspiracy, not its effect, which the antitrust laws condemn. *Northern Pacific Ry. Co. v. United States*, 1958, 356 U.S. 1, 78 S.Ct. 514; *United States v. Socony Vacuum Oil Co.*, 1950, 310 U.S. 150, 224, 60 S.Ct. 811, 845.

The complaint alleges the use of monopoly chain buying power by a large interstate competitor who has sought to eliminate the competition of the petitioner. This is well within the statements of the Court in *United States v. Griffith,* 1948, 334 U.S. 100, 107, 68 S.Ct. 941, 945:

> "It follows *a fortiori* that the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy a competitor, is unlawful."

The complaint alleges facts raising an issue of specific intent to monopolize the retailing of radio, television and household appliances by Broadway-Hale by boldly using chain buying power to cause a conspiracy to refuse to deal against petitioner. These allegations were not denied by the respondents and the petitioner was entitled to a trial by jury on this issue alone. *Times Picayune Publishing Co. v. United States,* 1953, 345 U.S. 594, 78 S.Ct. 891.

This Court has held that "injury to the public" is not a jurisdictional requirement in a private antitrust suit. *Radovich v. National Football League, et al.,* supra. This Court has held that the antitrust laws provide jurisdiction to allow a private trader to gain redress as to a conspiracy directed solely to the elimination of his business without more. *Binderup v. Pathe Exchange,* 1923, 263 U.S. 291, 44 S.Ct. 96.

Neither *Apex Hosiery Company v. Leader,* 1940, 310 U.S. 469, 60 S.Ct. 982, nor *Times Picayune Publishing Co. v. United States,* 1953, supra, allow the Courts to prevent petitioner from a right to a trial

by jury under the antitrust laws. The *Apex* case was involved only with the issue of what is the *kind of* restraint condemned by the Sherman Act. It distinguished restraints from the conduct of labor unions in a strike situation from restraints affecting free competition in business and commercial transactions. This action clearly involves restraints contrary to a free and untrammeled competitive market involving commercial transactions. The *Times Picayune* case involved the business practices of a single business entity and its effect on a single competitor. The Court of Appeals in this action, it is respectfully urged, could not say on the record before it that the case did not involve a group refusal to deal, or a group conspiracy to discriminate. The Court of Appeals likewise in this action could not say on the record before it that the case did not involve monopolization or a specific intent to monopolize. The Court of Appeals, it is respectfully urged, in this action could not say on the record before it that the respondents had not engaged in predatory, bold conduct aimed at the destruction of the petitioner.

The antitrust laws are a charter of liberty. They afford protection to the public by insuring freedom of and to trade. The demand a free, open, and untrammeled market place, allowing common opportunities. The acts protect the public, in part, by giving rights to traders to sue those that interfere with freedom to trade in such a market. The public policy of the antitrust laws providing for such a market place is a concern of the legislature, not the courts. A con-

spiracy composed of an interstate retailer with competing manufacturers and distributors doing business in interstate trade and commerce to combine to eliminate supplies flowing across the country to the competitor of one of the interstate members of the conspiracy is a restraint in or affecting a substantial amount of interstate trade and commerce. The use of chain buying power by a preferred and powerful interstate retailer to cause a group of interstate suppliers to single out a competitor and prevent his competition in a substantial market place is a restraint in or affecting a substantial amount of interstate trade and commerce.

VII.

ARGUMENT.

I.

THE SHERMAN ACT MAKES IT A PUBLIC WRONG FOR COMPETITORS TO COMBINE TO DISCRIMINATE OR BOYCOTT OR FOR ONE WITH A MONOPOLISTIC POWER OR WITH AN INTENT TO MONOPOLIZE TO CAUSE A GROUP CONSPIRACY TO SINGLE OUT ITS COMPETITOR AND SUBJECT IT TO SUCH RESTRAINTS. THE CLAYTON ACT, SECTION 4, AFFORDS THE FEDERAL COURTS JURISDICTION TO PROTECT THE SINGLE TRADER AGAINST SUCH COMBINATIONS AND MONOPOLISTIC ACTS.

A. Radovich v. National Football League held that the antitrust laws "protect the victims of forbidden conduct as well as the public".

1. The issue of "public injury" was distinctly put in issue in the Radovich case and directly rejected.

The issue before the Court is whether or not Section 4 of the Clayton Act extends jurisdiction to the

federal courts on behalf of a single trader who has been singled out by a combination and a monopolistic competitor to his injury and damage resulting from the types of restraints of trade condemned by the Sherman Act.

The learned Courts below have ruled that the Sherman Act expresses a congressional purpose to protect only the public at large. Thus restraints of trade, it was held, which are not voluntary restraints by the participants to fix prices, divide territories, restrict production, or otherwise control the market to the detriment of purchasers or consumers of goods and services or, unless the restraints otherwise are reasonable, but motivated by a specific intent to accomplish the equivalent of a forbidden restraint, are not within the ambit of the Sherman Act. (R. 170-171.)

The Court below has held that the requirements of private injury and damage resulting from anything forbidden in the antitrust laws as set forth by Section 4 of the Clayton Act were to be interpreted as subject to the judicially imposed test that there be "conduct by which the 'public' could conceivably suffer injury." (R. 180.)

It is respectfully asserted, however, that this Court has never viewed the jurisdiction of the federal courts under the antitrust laws as involving anything other than the jurisdictional test of interstate trade and commerce. The filing of a bona fide complaint disclosing conduct in or affecting a substantial amount of interstate trade or commerce and the perpetration of conduct of the kind condemned in the act meets the

jurisdiction requirements of Section 4 of the Clayton Act. *Hart v. Keith Vaudeville Exchange*, 1923, 262 U.S. 271, 43 S.Ct. 540; *Binderup v. Pathe Exchange*, 1923, 263 U.S. 291, 44 S.Ct. 96; *Moore v. Mead's Fine Bread Co.*, 1954, 348 U.S. 115, 75 S.Ct. 148.

That "public injury" is not a jurisdictional test in the application of Section 4 was directly raised and decided in *Radovich v. National Football League*, 1957, 352 U.S. 445, 77 S.Ct. 390. In this case the Court of Appeals below had held that the petitioner there, Radovich, could not obtain redress for personal injury and damage because:

> "Within the four corners of the complaint, we doubt that the alleged means, restraint by the reserve clause, and its enforcement, is legally sufficient to support, without more, a conclusion that these means were calculated to prejudice the public or unreasonably restrain interstate commerce." (Ninth Cir., 1956, 231 2d 620, at 623.)

The petition for a writ of certiorari in *Radovich* thus raised the question:

> "2. Whether a complaint for injuries by a private party under Section 4 of the Clayton Act is sufficient if it states violations of the antitrust laws and injury thereby."

The question of "public injury," on the acceptance of the writ of certiorari by this Court in the *Radovich* case, was then exhaustively briefed.

Petitioner Radovich urged that, "For public injury must occur in the participation in conduct condemned by Congress as harmful to the public. This rests on

the historic difference between the function of legislation and the function of judicial enforcement of Constitutional enactments." (Petitioner's Opening Brief, *Radovich v. National Football League*, No. 94, October Term, 1956, at p. 20.) The United States of America, as amicus curiae, urged that ". . . the court below clearly erred in reading into the statutory authorization the further requirement that the plaintiff in such a suit allege and prove that the violation charged against the defendant was 'calculated' to prejudice the public.' * * * Congress, when it outlawed certain conduct, made its own determination that the outlawed conduct was against the public interest." (Brief for the United States of America as Amicus Curiae, id., at pp. 11 and 12.)

The respondents in the *Radovich* case urged that, "The right of plaintiff to recover treble damages is incidental and subordinate to the protection of the public and it was created to induce private persons to aid in enforcement of the antitrust laws. Hence to state a claim for relief, a complaint must allege facts which would establish that the violations of the Sherman Act by which plaintiff allegedly has been damaged, are of such nature that the public itself has sustained a substantial injury." (Brief for Respondents, id., at p. 56.) The respondents urged that *Apex Hosiery v. Leader*, 310 U.S. 469, 500, 69 S.Ct. 982, 996, supported this contention. (Id., at p. 57.)

This Court after such presentation ruled as follows (352 U.S. 445, 453, 77 S.Ct. 390, 395):

> "Petitioner's claim need only be 'tested under the Sherman Act's general prohibition on unrea-

sonable restraints of trade.' Times Picayune Publishing Co. v. United States, 1953, 345 U.S. 594, 614, 73 S.Ct. 872, 883, 97 L.Ed. 1277, and meet the requirement that petitioner has thereby suffered injury. Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public[10] and has provided sanctions allowing the private enforcement of the antitrust laws by the aggrieved party. These laws protect the victims of forbidden practices as well as the public. Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 1948, 334 U.S. 219, 236, 68 S.Ct. 996, 1006, 92 L.Ed. 1328. Furthermore, Congress itself has placed the private antitrust litigant in a most favorable position through the enactment of § 5 of the Clayton Act.[11] Emich Motors Corp. v. General Motors Corp., 1951, 340 U.S. 558, 71 S.Ct. 408, 95 L.Ed. 534. In the face of such a policy this Court should not add re-

[10] In Apex Hosiery Co. v. Leader, 1940, 310 U.S. 469, 60 S.Ct. 982, 84 L.Ed. 1311, this Court said: "The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, *all of which had come to be regarded as a special form of public injury.*" (Emphasis supplied.) Id., 310 U.S. at page 493, 60 S.Ct. at page 992. In Standard Sanitary Mfg. Co. v. United States, 1912, 226 U.S. 20, 33 S.Ct. 9, 57 L.Ed. 107, speaking of the antitrust laws, the Court said: *"The law is its own measure of right and wrong,* of what it permits or forbids, *and the judgment of the courts cannot be set up against it* in a supposed accommodation of its policy with the good intention of the parties, and, it may be, of some good results." (Emphasis supplied.) Id., 226 U.S. at page 49, 33 S.Ct. at page 15.

"[11] 38 Stat. 731, 15 U.S.C. § 16, 15 U.S.C.A. § 16, declares that a final judgment against a defendant in proceedings by the Government for violation of the antitrust laws may be introduced by a private litigant in a subsequent treble damage action and establishes *prima facie* a violation of the antitrust laws."

quirements to burden the private litigant beyond what is specifically set forth by Congress in those laws."

But the Court of Appeals below distinguished the *Radovich* case from the instant action by first labeling it a pleading case and second by asserting that the *Radovich* case involved the elimination of the defendants' only competitor, the All America Conference. (R. 175, 176.) The Court stated:

> "Read thus, the *Radovich* case is entirely consistent with *Shotkin, Fedderson,* and all other cases in which the Supreme Court and the lower federal courts have adhered to the requirement that a violation of the Sherman Act requires conduct of defendants by which the public is or conceivably may be ultimately injured."[1]

As to these two contentions, petitioner respectfully submits that the instant case is much *more* a pleading case than the *Radovich* case, and second that this Court in *Radovich* made its ruling with respect to public injury, not with a view to the facts as such, but as a matter of legal principle.

Radovich involved a motion to dismiss *after detailed and exhaustive answers* were filed by the defendants, which placed the allegations of the complaint in the *Radovich* case directly in issue. (Transcript of Record, *Radovich v. National Football*

[1]But compare the 10th Circuit's opinion in *New Home Appliance Center v. Thompson,* 1957, 250 F.2d 881, with *Shotkin v. General Electric Co.,* 10 Cir., 1948, 171 F.2d 236, and *Fedderson Motors v. Ward,* 10 Cir., 1950, 180 F.2d 519. The 10th Circuit no longer supports this statement.

League, October Term, 1956, No. 94, at pp. 18-57.) Here the moving papers of the respondents involved both a motion to dismiss and a motion for summary judgment before answer. But the affidavits in support of the motion for summary judgment were not addressed to the jurisdictional requirements of interstate commerce, nor were they addressed to showing, by factual statements of what was said and done, that the alleged restraints of trade had not in fact occurred. They were addressed to the showing of a lack of public injury; that is, that the public could obtain the products denied the petitioner here and that the actions of Broadway-Hale did not affect the general availability of these products to the public.

B. The doctrine of "public injury" is as inapplicable to a single trader case as it was to the Radovich case.

1. The Sherman Act protects the single trader's competition.

If "public injury" is not a jurisdictional test then the Court of Appeals should have determined whether or not the matters involved were matters of interstate trade and commerce and whether or not the conduct of the respondents involved a restraint of such trade and commerce. (*Binderup v. Pathe Exchange,* 1923, 263 U.S. 291, 44 S.Ct. 96.)

Such is the case because the Sherman Act had adopted the public policy of the common law that restraints of trade are public wrongs. What was a question of public policy at common law became under the antitrust laws a legislative statement of statutory law. *United States v. Addyston Pipe and Steel Co.* (6th Cir., 1898), 85 Fed. 271, affirmed 1899, 175 U.S.

211, 20 S.Ct. 96; *Chattanooga Foundry & Pipe Works v. Atlanta,* 1906, 203 U.S. 390, 27 S.Ct. 65, affirming 6th Cir., 1903, 127 Fed. 23.

Thus the antitrust laws have as their very roots the voluntary restraints of a single trader. Judge Taft, *United States v. Addyston Pipe & Steel Co.,* 85 Fed. 271, 279:

> "From early times it was the policy of Englishmen to encourage trade in England, and to discourage those voluntary restraints which tradesmen were often induced to impose on themselves by contract. Courts recognized this public policy by refusing to enforce stipulations of this character. The objections to such restraints were mainly two. One was that by such contracts a man disabled himself from earning a livelihood with the risk of becoming a public charge, and deprived the community of the benefit of his labor. The other was that such restraints tended to give to the covenantee, the beneficiary of such restraints, a monopoly of the trade, from which he had thus excluded one competitor, and by the same means might exclude others."

When the restraint is not voluntary, but involves a coercive conspiracy an additional public wrong is involved in the participation in the conspiracy. (Id., at 293.) See also *Rex v. Eccles,* 1783, 1 Lea. C.C. 274; *Morris Run Coal Co. v. Barclay Coal Co.,* 1871, 68 Penn. 123. As to a combination not affecting supplies to competitors see *Mogul Steamship Co. v. McGregor & Co.* [1892], App. Cas. 5, affirming 23 Q.B.D. 598 (1889).

The antitrust laws, it is respectfully submitted, represent a broad charter of liberty protecting not only the public against all forms of combinations, but also maintaining a free and open competitive market to all traders, allowing common opportunities for each member of the public to succeed, not because of birth or status, but because of ingenuity and ability. Such abilities were to be tested in a free and untrammeled market affording equal competitive opportunities.[2]

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[2] *W. W. Montague & Co. v. Lowry*, 1904, 193 U.S. 38, 46, 24 S.Ct. 307, 309;

Chattanooga Foundry & Pipe Works v. Atlanta, 1906, 203 U.S. 390, 396-7, 27 S.Ct. 65, 66;

Eastern States Retail Lumber Dealers Ass'n v. United States, 1914, 234 U.S. 600, 609-610, 34 S.Ct. 951, 953;

United States v. Patten, 1913, 226 U.S. 525, 541, 33 S.Ct. 141, 144-145;

Ramsey v. Associated Bill Posters, 1923, 260 U.S. 501, 512, 43 S.Ct. 167, 168;

Binderup v. Pathe Exchange, 1923, 263 U.S. 291, 312, 44 S.Ct. 96, 100;

Anderson v. Shipowner's Ass'n of the Pacific, 1926, 272 U.S. 359, 363, 47 S.Ct. 125, 126;

United States v. Colgate & Co., 250 U.S. 300, 307, 39 S.Ct. 465, 468:

> "The purpose of the Sherman Act is to prohibit monopolies, contracts, and combinations which probably would unduly interfere with the free exercise of their rights by those engaged, or who wish to engage, in trade and commerce—in a word to preserve the right of freedom to trade."

Paramount Famous Lasky Corporation v. United States, 1930, 282 U.S. 30, 44, 51 S.Ct. 42, 45;

Fashion Originators' Guild v. F.T.C., 1941, 312 U.S. 457, 466, 61 S.Ct. 703, 707;

United States v. Socony-Vacuum Oil Co., 1940, 310 U.S. 150, 214, 60 S.Ct. 811, 840;

Associated Press v. United States, 1945, 326 U.S. 1, 15, 65 S.Ct. 1416, 1422:

> "The Sherman Act was specifically intended to prohibit independent businesses from becoming 'associates' in a common plan which is bound to reduce their competitor's opportunity to buy or sell the things in which the group compete. Victory of a member of such a combination over its

The antitrust laws protected the liberty of contract by condemning actions which restrained the liberty to contract. *Standard Oil Co. v. United States,* 1911, 221 U.S. 1, 62, 31 S.Ct. 502, 516.

And although *Standard Oil* interpreted the Act to condemn only unreasonable restraints, it did not read out the word "every" from Section 1.

The Sherman Act thus represents a congressional will to maintain freedom of trade as far as its constitutional power extended.[3] *United States v. South-*

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business rivals achieved by such collective means cannot consistently with the Sherman Act or with practical, everyday knowledge be attributed to *individual* 'enterprise and sagacity'; such hampering of business rivals can only be attributed to that which really makes it possible—the collective power of an unlawful combination."

International Salt Co. v. United States, 1947, 332 U.S. 392, 396, 68 S.Ct. 12, 15;

Mandeville Island Farms v. American Crystal Sugar Co., 1948, 334 U.S. 219, 236, 68 S.Ct. 996, 1006;

Northern Pac. Ry. Co. v. United States, 1958, 356 U.S. 1, 4-5, 78 S.Ct. 514, 517-518.

[3]Congress has indicated its determination for a positive antitrust policy and the protection of the small business concern. The policy of Congress, expressed in the Small Business Act, July 18, 1958, 72 Stat. 394, amending Act of July 30, 1953, 67 Stat. 232, 15 U.S. Code, Section 631 et seq., is worthy of note:

"Sec. 2: (a) The essence of the American economic system of private enterprise is free competition. Only through full and free competition can free markets, free entry into business, and opportunities for the expression and growth of personal initiative and individual judgment be assured. The preservation and expansion of such competition is basic not only to the economic well-being but to the security of this Nation. Such security and well-being cannot be realized unless the actual and potential capacity of small business is encouraged and developed. It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as possible, the interests of small-business concerns in order to preserve free competitive enterprise, to insure that a fair proportion of the total purchase and contracts for property and services for the Government (including but not limited to

Eastern Underwriters Ass'n, 1944, 322 U.S. 533, 64 S.Ct. 1162.

An effect of the Act of 1890 was to render contracts and combinations against public policy at the common law, unlawful in an affirmative and positive sense which allowed private traders to obtain redress over activities condemned by the statute. *United States v. Addyston Pipe and Steel Co.* (6th Cir., 1899), 85 Fed. 271, at 279. The right to recovery was not given to the public, but to the private trader. *Atlanta v. Chattanooga Pipe & Foundry Co.* (6th Cir., 1903), 127 Fed. 23, 270. The private action for damages under the antitrust laws is thus not derivative or secondary or subsidiary. It is simply a congressionally imposed right against those that violate its mandate of free trade.

It is thus respectfully submitted that the invalidation of the doctrine of "public injury" in the setting of the *Radovich* case has equal application in the instant setting involving a group conspiracy and the exercise of monopolistic buying power to gain a com-

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contracts for maintenance, repair, and construction) be placed with small business enterprises, to insure that a fair proportion of the total sales of Government property be made to such enterprises, and to maintain and strengthen the overall economy of the Nation."

The Senate Select Committee on Small Business, Report of Private Antitrust Enforcement in Protecting Small Businesses, 1958, Senate Report No. 1855, 85th Congress, 2nd Session, has recommended measures to further strengthen the role of the antitrust laws in their protection of small business.

The income tax treatment of Section 4, Clayton Act, settlement or judgment recoveries have been liberalized on behalf of the private antitrust plaintiff. Section 1306, I.R.C. of 1954 as added by Technical Amendments Act of 1958, Section 58.

petitive advantage and to eliminate the competition of a competitor.

C. A single competitor's rights to freedom of contract are protected by the antitrust laws and a restraint on this right when it involves matters of interstate trade and commerce is a restraint on interstate trade and commerce.

1. Binderup v. Pathe Exchange is a direct ruling that the antitrust laws condemn the entry into a conspiracy directed at a single competitor.

It is asserted in petitioner's application for a writ of certiorari that the case of *Binderup v. Pathe Exchange*, 1923, 263 U.S. 291, 44 S.Ct. 96, is controlling here.

In the *Binderup* case this Court held that a single trader who does business with interstate corporations and who thereby engages in transactions affecting the free flow of merchandise in interstate channels has an action under the antitrust laws against these interstate distributors who combine to refuse to deal with him or who coerce others to so refuse to deal even though the conspiracy is solely directed against the single trader.

It is respectfully asserted that this Court in the *Binderup* case was not concerned with market control which would result by the conspiracy directed against Binderup; it was concerned with the conspiracy itself. Clearly there were many enterprises available on the market in the *Binderup* setting which could have exhibited motion pictures or carried out Binderup's business. This Court was not concerned with market control; it was concerned that a conspiracy had taken place which put an end to Binderup's contracts and

future business potentials, and, a conspiracy which "restricts, in that regard, the liberty of *a* trader to engage in business." (Id., at 263 U.S. 312, 44 S.Ct. 101. Emphasis added.)

A conspiracy had taken place by interstate firms directed at a petitioner who did business with them or who could have done business with them. This conspiracy was meant to oppress Binderup. This was the concern of the Court, not with market control. The public wrong under the Sherman Act's standards was in the entry into a combination to harm a trader with interstate contacts.

Petitioner's complaint below included the charge of conspiracy engaged in by respondents.

The complaint of petitioner alleges a conspiracy between all the respondents. Section III, pr. 6 of the complaint states (R. 9):

> "Beginning at a period prior to 1952, and continuing uninterrupted up to and including the date of the filing of this complaint, the defendants, all well knowing the facts herein alleged, have restrained trade and commerce in the interstate distribution and sale of radios, television sets, clothes washers and dryers, refrigerators, electric and gas ranges, phonographs and electrical appliances in the San Francisco Bay Area by contracting, combining, conspiring together, and each with the other, in restraint and monopoly of said trade . . ."

Clearly, this is a conspiracy charge. The public wrong in petitioner's complaint is the entry into this conspiracy by otherwise competitive firms or through

"dealing with Hale throughout the period of time alleged on a chain basis and have manufactured, distributed and sold the products for resale in the San Francisco Bay Area in consideration of manufacturing, distributing and selling the products to Hale for resale in other parts of the West Coast area of the United States." (R. 12.)

Such a conspiracy is a conspiracy whether or not it includes all the suppliers of merchandise in the area or only some of them. A conspiracy may be composed of only two or more persons. In *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons,* 1951, 340 U.S. 211, 71 S.Ct. 259, the conspiracy involved was between two liquor manufacturers who were affiliated with each other. The complaint of the petitioner alleged that these two liquor companies had conspired to refuse to deal with wholesalers in Indiana who would not resell at maximum prices fixed by the companies. The petitioner was unable to obtain a continuing supply of liquor from these two manufacturers.

Manifestly, Seagram and Calvert were not the only two manufacturers of liquor products available in the market, but the evidence was sufficient to justify a verdict that the two companies had conspired together not to sell liquor to the wholesaler.

But it would no doubt next be urged that the conspiracy involved the fixing of maximum prices, conduct illegal per se. This Court, however, stated: "But the Sherman Act makes it an offense for respondents to agree among themselves to stop selling to particular customers." (Id., 340 U.S. 214, 71 S.Ct. 261.)

Thus aside from the clear indication that the public wrong involved in the *Kiefer* case included a conspiracy to refuse to deal between two putative competitors, as well as the effectuation of a price fixing agreement, it is respectfully asserted that *Kiefer* stands for the proposition that the availability of other product to a single trader victimized by a conspiratorial refusal to sell is immaterial. Accord, *C. E. Stevens v. Foster & Kleiser Co.*, 1940, 311 U.S. 255, 61 S.Ct. 210.

Further, if the conspiracy must relate to an issue of "market control" as stated by the Court below, the instant action is not lacking this issue.

This action manifestly does not deal with a situation in which two local competitors vie for the business of manufacturers who do business on an exclusive franchise basis. The instant action involves a respondent retailer who "enjoys monopolistic buying power by reason of the large number of retail outlets it operates." (Complaint, pr. 8, p. 11.)

Broadway-Hale has (Complaint, pr. 8, pp. 11-12):

> ". . . used its monopolistic buying power to negotiate terms and conditions of acquisition and purchase of the products manufactured, distributed and sold by the manufacturer-distributor defendants."
>
> ". . . purchased and continues to purchase the products of the manufacturer-distributor defendants upon the condition that the manufacturer-distributor defendants do not sell their products to the plaintiff."

Clearly, these allegations are sufficient to raise the issue of Broadway-Hale's monopolistic buying power. *United States v. Employing Plasterers' Ass'n,* 1954, 347 U.S. 186, 74 S.Ct. 452. These allegations were not denied by the respondents, nor did they proffer any evidential facts in their affidavits to show the in fact situation with respect to Broadway-Hale's asserted monopolistic buying power.

Thus the action is well within the principle that a simple monopolist, otherwise lawfully holding such power, may not use his power to gain a competitive advantage or to eliminate a competitor.

United States v. Griffith, 1948, 334 U.S. 100, 107, 68 S.Ct. 941, 945:

> "It follows a fortiori that the use of monopoly power, however lawfully acquired, to foreclose competition, to gain a competitive advantage, or to destroy *a competitor,* is unlawful." (Emphasis added.)

The attempt to eliminate the competition of a competitor by one enjoying monopolistic buying power by reason of the large number of retail outlets it operates is an assumption of power which the Sherman Act condemns.

Such action restrains competition as much as the fixing of retail maximum prices. It is bold, predatory behavior. *Lorain Journal Co. v. United States,* 1951, 342 U.S. 143, 72 S.Ct. 181.

Finally, it may be asserted that each of the alleged manufacturer respondents does business on the basis of brand names. Their extensive advertising is well

known and they attempt to lure the customer by brand preference. Thus the success of the alleged use of Broadway-Hale's use of monopolistic buying power was not inconsequential or limited. A mere mention of the brand names admittedly deprived petitioner by this scheme shows significant fruition:

> R.C.A., General Electric, Philco, Admiral, Emerson, Zenith, Whirlpool, O'Keefe & Merritt, Tappan.

These brands were not denied petitioner by reason of any asserted fault on his part, but because his competitor had sufficient power to eliminate these brands from interstate sale and transportation for delivery to Klor.

II.

THE COMPLAINT AND THE PROCEEDINGS BELOW INVOLVED UNDENIED PUBLIC WRONGS WHICH WERE NOT DISPOSED BY THE AFFIDAVITS OF THE DEFENDANTS.

A. Summary judgment is not a substitute for a trial but only allows the determination of whether there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

1. Summary judgment affidavits which do not deny the entry into restraints of trade, which do not purport to meet the genuine issues of a complaint, and which fail to give the Court material and relevant information within the sole knowledge of the moving party cannot form the basis of a valid summary judgment ruling.

This Court has had recent occasion to reverse a summary judgment ruling originally in favor of a plaintiff under the antitrust laws. *Lawlor v. National Screen Service Corporation,* 1957, 352 U.S. 992, 77

S.Ct. 526. In a *per curiam* opinion the Court agreed with the Court of Appeals that summary judgment could not have been entered on the record before the lower Court. The Third Circuit had stated, 238 F.2d 59, 65:

> "It is well-settled that summary judgment may be granted only if the pleadings, depositions, admissions and affidavits '* * * show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.' Fed.R.Civ.P. 56 (c), 28 U.S.C.; see F. A. R. Liquidating Corp. v. Brownell, 3 Cir., 1954, 209 F.2d 375. Any doubt as to the existence of a genuine issue of fact is to be resolved against the moving party. Sarnoff v. Ciaglia, 3 Cir., 1947, 165 F.2d 167, 168. Further, documents filed in support of a motion for summary judgment are to be used in determining whether issues of fact exist and not to decide the fact issues themselves. Frederick Hart & Co. v. Recordgraph Corp., 3 Cir., 1948, 169 F.2d 580."

Further, it appears well settled that the pleadings upon which the motion is based are to be liberally construed in favor of the party opposing the motion. *Purity Cheese Co. v. Frank Ryser Co.,* 7 Cir., 1946, 153 F.2d 88, *Hoffman v. Babbit Bros. Trading Co.,* 9 Cir., 1953, 203 F.2d 636; *Anderson v. United States,* 2 Cir., 1950, 182 F.2d 296.

As stated in 6 Moore, *Federal Practice,* Second Edition, Section 56.15(3), pages 2123-2125:

> "The courts are in entire agreement that the moving party for summary judgment has the burden of showing the absence of any genuine issues as

> to all material facts, which under applicable principles of substantive law, entitle him to judgment as a matter of law. The courts hold the movant to a strict standard. To satisfy his burden the movant must make a showing that is quite clear what the truth is, and that excludes any real doubt as to the existence of any genuine issue of material fact. Since it is not the function of the trial court to adjudicate genuine factual issues at the hearing on the motion for summary judgment, in ruling on the motion all inferences of fact from the proofs proffered at the hearing must be drawn against the movant and in favor of the party opposing the motion."

It is respectfully submitted that the affidavits of the respondents below did not satisfy these strict standards. At the outset it is noted what factors known to the respondents have been omitted by these affidavits.

1. The dollar amount of the purchases made by the respondent Hale from the co-respondents.

2. The nature and manner in which the respondents transacted their business with retail stores in the San Francisco area.

3. The number of retail stores operated by Broadway-Hale and how sales were transacted with this account.

4. The manner in which the respondents classified their accounts. Whether or not Broadway-Hale was a special account and received favorable treatment.

5. The reasons for the demonstrated refusal to deal with petitioner.

6. The basic economic facts with respect to Broadway-Hale and its operations during the period of time involved.

Manifestly the affidavits of respondents were tied to their motion for dismissal and were only directed to the concept of "public injury".

Thus, it is respectfully submitted, the affidavits were not directed to the material issues raised by the complaint.

B. Since the proceedings below involved a conspiracy to refuse to deal, which is per se forbidden by the antitrust laws, there were genuine antitrust issues in dispute.

1. The affidavits of respondents did not meet the question of the existence of this conspiracy.

As has been indicated the petitioner's complaint clearly charged a conspiracy among all the respondents, and that pursuant to this conspiracy the petitioner was unable to obtain the products of the respondents at the scheme of Broadway-Hale. The affidavits of respondents as has been shown, show this refusal to deal, and do not offer any reason for the refusal. Yet under the *Binderup* case, supra, this is per se illegal conduct even though directed at a single trader. Such a charge can only be settled by the trier of fact, in this case the jury, unless there is a demonstration that beyond a doubt such a conspiracy was not entered into. No such showing was made below.

In petitioner's petition for a writ of certiorari it was urged that the antitrust laws condemn *"the* contract, combination or conspiracy" when per se illegality is involved. *United States v. Socony Vacuum*

Oil Co., Inc., 1940, 310 U.S. 150, 60 S. Ct. 811 footnote 59, at 310 U.S. 150, 224, 60 S.Ct. 811, 845.

Under the conspiracy charge in the complaint, petitioner was striking at a plan and a concert designed to oppress him and prevent his competition to Broadway-Hale. The entry into such a combination is manifestly a public wrong when the parties actually agree to refuse to sell their products to the petitioner for such a purpose. A group boycott is illegal per se. *Northern Pacific Ry. Co. v. United States*, 1958, 356 U.S. 1, 78 S.Ct. 514; *Kiefer Stewart v. Seagram & Sons*, 1951, 340 U.S. 211, 71 S.Ct. 259.

It is respectfully urged that the proceedings below raised a bona fide showing which should have raised a judicial doubt as the non-existence of the group refusal to deal, as follows:

1. The affidavits of the respondents showed the refusal of the respondents to sell their products to petitioner.

2. The affidavits did not set forth any reason for this refusal.

3. The allegations of the complaint alleging conspiracy were not controverted.

4. The affidavits were devoid of a convincing factual basis to support the conclusion that Broadway-Hale was not using chain buying power as alleged in the complaint.

5. The products of the petitioner were shown to be not sold on an exclusive franchise basis but were apparently available to other dealers.

C. Since the proceedings below involved both monopolistic power by a large chain buyer of merchandise and an intent to monopolize a part of an area affecting a substantial amount of interstate commerce, there were genuine antitrust issues in dispute.

1. The affidavits of respondents did not meet the issues of monopoly power and specific intent to monopolize.

It is respectfully submitted that the proposition advanced by the Courts below is that a chain buying retailer with monopolistic power (Complaint, Pr. 5, p. 5, Pr. 6, p. 10, Pr. 6 g., h., p. 11, Pr. 8, 11-12) can organize a group boycott against its competitor without liability under the antitrust laws even though it is engaged in interstate commerce and even though a substantial amount of interstate commerce is affected by such activities.

It is further respectfully urged that the Court of Appeals below reached this conclusion through an erroneous interpretation of *Times Picayune Pub. Co. v. United States,* 1953, 345 U.S. 594, 78 S.Ct. 891. Thus a key to the Court of Appeals' opinion seems to be at R. 171-172 wherein it is stated:

> "If a business transaction and the effect and object of such transaction between two or more persons is lawful, then the transaction cannot be nor can it create an unlawful conspiracy. If 'X Company', a manufacturer, refuses to sell to Klor's Inc., and sells to 'Y Company', a retailer who also agrees to buy from 'X' as long as 'X' does not sell to Klor's, more than one person is involved and they have agreed not to sell, but their act is not necessarily illegal".

But whether or nor there is a conspiracy or a combination directed at a competitor is a question of fact which cannot be decided on summary judgment in the absence of strong and convincing demonstration which erases any judicial doubt as to the non-existence of the conspiracy. *United States v. Interstate Circuit, Inc.*, 1939, 306 U.S. 208, 59 S.Ct. 467.

Times Picayune to the Court below meant that an antitrust case must *always* involve market control. But clearly when an action involves a conspiracy per se in restraint of trade, market control is not an indispensable issue. (Id., at 345 U.S. 594, 614-615, 624-625; 73 S.Ct. 883-884, 889.)

Market control was decisive in the *Times Picayune* case because it was a tie-in case in which a single newspaper corporation which owned a morning and afternoon newspaper adopted a policy of selling advertising space only if the customer used both newspapers. This was alleged by the United States to have adversely affected the single competitor to the Times Picayune, the Item, and potential competition. After a complete trial which showed the exact market situation, this Court then held that the District Court had erroneously held that method of doing business as chosen by Times Picayune was a violation of Sections 1 and 2 of the Sherman Act. Thus the following may be said as to *Times Picayune* in relation to this action: (a) Times Picayune was a tie-in case. This is a conspiracy case; (b) Times Picayune was concerned with a simple business practice which may or may not have an intended effect of oppressing a compet-

itor. This action involves not a simple business practice, but the organization of a conspiracy directed at a competitor which can have no other conceivable purpose than the direct harm of a competitor. (c) Times Picayune did not involve the direct elimination of business opportunities of a competitor, but only the ability of the general advertising public to place advertisements, with an asserted effect on a competitor which the evidence failed to prove. (d) Times Picayune did not involve "Bold, relentless, predatory commercial behavior"; (e) This Court specifically met the problem of "specific intent" under Section 2, in *Times Picayune,* and held that the record did not support the conclusion that a specific intent to monopolize had existed. In the instant case the Court of Appeals did not apparently examine the question of the "specific intent" of Broadway-Hale to monopolize a part of interstate trade and commerce in violation of Section 2 of the Sherman Act. That one holding monopolistic power is in per se violation of Section 2 when it uses its power to cause a withholding of *some* custom from a single competitor who has not been entirely eliminated from competition is the direct ruling, however, of *Lorain Journal Co. v. United States,* 1951, 342 U.S. 143, 72 S.Ct. 181.

Since the complaint of the petitioner directly raised the monopolistic buying power of the defendant Broadway-Hale and alleged that this power was used to deny him custom and to afford Broadway-Hale special favoritism and treatment, the issues of monopoly power and the specific intent of Broadway-Hale to monopolize were clearly before the Courts below.

It is respectfully submitted that the record below could not possibly allow a judicial ruling that such monopoly power or a specific intent had not existed.

1. The record below which showed competition to Broadway-Hale was in terms of numbers only. Broadway-Hale could have exercised 99.9% of the dollar volume of sales or purchases of the respondents' merchandise in the San Francisco area consistent with the affidavits.

2. Broadway-Hale could have exercised complete monopoly control in other cities or areas where it operated stores consistent with the affidavits.

3. Broadway-Hale could have eliminated one or dozens of other competitors consistent with its affidavits, and not disclosed by it in its affidavit before the Court.

4. Broadway-Hale could have acquired one or a dozen of competing retail dealers or retail stores in San Francisco or elsewhere consistent with its affidavit.

5. Broadway-Hale could have embarked on a plan or program to deny to any competitor it so chose access to the respondents' merchandise consistent with the affidavits.

6. Broadway-Hale could have been established as the sole "cream" or "favored" account of the respondents consistent with the affidavits.

And aside from the lack of reliable information before the Court on the issues of monopolistic power and specific intent, the record affirmatively discloses factors consistent with a monopolistic purpose in vio-

lation of Section 2 of the Sherman Act: (a) The singling out of petitioner, a direct competitor, to cause a refusal to deal by its suppliers; (b) the failure to disclose the information relevant to these issues; (c) the failure to deny the statements of petitioner's complaint raising its conspiratorial conduct and its refusal to do business unless Klor did not receive merchandise; (d) the ability of Broadway-Hale to procure the supplies denied Klor.

The expressed statements of this Court in *Times Picayune* and *Lorain Journal* that the antitrust laws strike down at the possibility of control and condemn attempts at control, unsupported by actual control itself, have been, it is respectfully submitted, dealt with in the most summary fashion.

It is respectfully submitted that the proceedings below disclose the following. The petitioner below filed a bona fide complaint charging that the respondents had entered into conspiracies in restraint of trade by refusal to deal with petitioner and by discriminating against him in favor of his competitor Broadway-Hale. Further the complaint directly raised the use of monopolistic buying power by Broadway-Hale and that it organized such a conspiracy to injure its competitor. This complaint raised triable issues of fact under Section 4 of the Clayton Act. The respondents did not meet these triable issues of fact in their affidavits in support of their motion for dismissal and summary judgment but introduced matters which were not entirely i. nsistent or contradictory with the contentions raised in the complaint. These affidavits were however held to be sufficient to have

sustained the difficult burden of proof in summary judgment procedure that the moving party convince the Court that there exists no triable issues of fact. This was so because of the legal proposition advanced that Section 4 of the Clayton Act does not afford a private trader direct remedial rights against conduct forbidden by the antitrust laws, but that such an action is subsidiary to the showing of a "public injury".

But, it is respectfully urged, this Court has held that the antitrust laws protect the liberty of a single trader to engage in business, and that a restraint of this liberty is a restraint of interstate trade and commerce upon the showing of the buying, or leasing of commodities from interstate companies or other matters of interstate commerce. Further, this Court has directly rejected the concept that liability under the antitrust laws depends upon a showing of such a "public injury".

CONCLUSION.

It is respectfully submitted that the judgment of the Court of Appeals below be reversed.

Dated, San Francisco, California,
November 21, 1958.

IRVIN GOLDSTEIN,
MAXWELL KEITH,
Attorneys for Petitioner.

(Appendix A Follows.)

Appendix A

Federal Rules of Civil Procedure, Rule 56. Summary Judgment

(a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof. As amended Dec. 27, 1946, effective March 19, 1948.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although

there is a genuine issue as to the amount of damages. As amended Dec. 27, 1946, effective March 19, 1948.

(d) Case Not Fully Adjudicated on Motion. If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) Form of Affidavits: Further Testimony. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as shall be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits.

(f) When Affidavits are Unavailable. Should it appear from the affidavits of a party opposing the mo-

tion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) Affidavits Made in Bad Faith. Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits caused him to incur, including reasonable attorney's fees, and any offending party or attorney may be adjudged guilty of contempt.